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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NORMAN GABAY,

Petitioner,

v.

MOSTAZAFAN FOUNDATION OF IRAN,
and
MOSTAZAFAN FOUNDATION OF NEW YORK,
n/k/a/ The Alavi Foundation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT MOSTAZAFAN FOUNDATION OF IRAN'S BRIEF IN OPPOSITION

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15 pp

TABLE OF CONTENTS

Page(s)

STATEMENT OF THE CASE 1

A. Nature of the Suit 1

B. Petitioner's Jurisdictional Theory 3

C. The Proceedings in the Courts Below 4

REASONS FOR DENYING THE WRIT 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES:

Baglab Ltd. v. Johnson Matthey Bankers Ltd., 665 F.Supp. 289 (S.D.N.Y. 1987) 10

First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S.611 (1983) . . 7, 8, 10, 11

Gabay v. Mostazafan Foundation of Iran, 151 F.R.D. 250, (S.D.N.Y. 1993) 4

Hercaire Int'l, Inc. v. Argentina, 821 F.2d 559 (11th Cir. 1987) 10

Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170(5th Cir. 1989) 10

Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia, 616 F.Supp. 660 (W.D. Mich. 1985) 10

(Table of Authorities continued)

Page(s)

Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) 10

Walter Fuller Aircraft Sales v. Republic of the Philippines, 965 F.2d 1375(5th Cir. 1992) 10

STATUTES:

28 U.S.C. § 1603(b) 3

28 U.S.C. § 1605(a)(3) 3, 7, 8

RULES:

Rule 30(b)(6), Fed. R. Civ. P. 5

Rule 10, S. Ct. Rules 12

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RESPONDENT MOSTAZAFAN FOUNDATION OF IRAN'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Nature of the Suit

Petitioner ("Gabay") brought suit in the district court below against the Mostazafan Foundation of Iran ("Iranian Foundation") and the Alavi Foundation of New York ("New York Foundation"), seeking compensation for the nationalization of his properties in Iran.

Gabay's instant petition seeks this Court's review of the Second Circuit's summary order affirming the district court's

dismissal of the suit for want of jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). (Pet. App. 2A-3A).

The Iranian Foundation is a charitable institution established by the Iranian revolutionary government in 1979. Its purpose is to administer and liquidate properties of the former Pahlavi Dynasty, of individuals who had illegally accumulated wealth during the Pahlavi regime and of those who had left Iran after the revolution. (Pet. App. 50A-51A). The Iranian Foundation's charter grants no judicial or seizure powers to it. Properties turned over to the Iranian Foundation were seized pursuant to orders issued by revolutionary courts established in 1979. The proceeds from the sales of seized properties are used to support poor and destitute people in Iran. The Iranian Foundation never had a presence in the United States, nor has it ever conducted business in the United States.

The New York Foundation is a non-profit corporation incorporated under New York law in 1973 for charitable, philanthropic, educational, and civic purposes. It was originally named "Pahlavi Foundation", but its name was changed after the Iranian revolution to "Mostazafan Foundation of New York" because its board did not wish to be identified with the Pahlavis. ("Mostazafan" in Farsi means "oppressed"). It was renamed in 1992 as "Alavi Foundation of New York," it present name. From its inception, the New York Foundation's board was composed of U.S. nationals and New York residents.

The New York Foundation is wholly separate and distinct from the Iranian Foundation. The latter never had an interest, direct or indirect, in the property of the New York Foundation, nor has it ever directed, overseen or controlled the New York Foundation.

B. Petitioner's Jurisdictional Theory

Gabay sought to vest jurisdiction in the District Court against the Iranian Foundation under the FSIA's "expropriation exception" to sovereign immunity, 28 U.S.C. §1605(a)(3). His complaint asserted that the Iranian Foundation and the New York Foundation were agencies or instrumentalities of Iran within the meaning of §1603(b) of the FSIA; that the Iranian Foundation had expropriated his properties in Iran and owned and operated them; that the New York Foundation was a mere agent or alter ego of the Iranian Foundation engaged in "commercial activity" in New York on behalf of its principal; and that because of the alter ego relationship, the Iranian Foundation itself should in law be regarded as engaging in commercial activity in New York. Thus, it was the core of Gabay's jurisdictional hypothesis that since the Iranian Foundation owned his properties in Iran and because it engaged in business in New York through its agent, the New York Foundation, it was subject to suit for the wrongful taking of Gabay's properties in Iran under the second sentence of the expropriation exception codified in §1605(a)(3) of the FSIA.[1]

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[1] The second sentence of §1605(a)(3) provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .

> (3) in which rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

C. The Proceedings in the Courts Below

1. The case was originally assigned to the Honorable Kimba M. Wood. The Iranian Foundation moved to dismiss the suit for lack of jurisdiction under the FSIA, and the New York Foundation moved to dismiss for failure to state a claim and, alternately, for summary judgment. In an opinion and order issued on October 15, 1993, Judge Wood denied both defendants' motions without prejudice and ordered limited jurisdictional discovery.[2] She ruled that Gabay had the burden of establishing the claimed alter ego relationship between the New York Foundation and the Iranian Foundation as his complaint asserted. Judge Wood reviewed painstakingly the principles under which the separate status of foreign governmental agencies or instrumentalities may be disregarded. (151 F.R.D. at 253-54, Pet. App. at 19A-21A). She emphasized that Gabay had the burden of overcoming the New York Foundation's presumption of separateness, and establishing by probative evidence that the alleged principal, the Iranian Foundation, exercised control over the day-to-day

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[2] Judge Wood stated in relevant part:

> . . . [T]he equities weigh in favor of permitting discovery in this case because the risk of significant encroachment on a foreign instrumentality's immunity from suit is slight. Under plaintiff's alter ego theory, discovery is likely to be directed primarily toward the New York Foundation, an entity incorporated under the laws of the State of New York over which this court unquestionably has jurisdiction. If defendants are proved correct that the two foundations are separate entities, there will have been no serious threat to the Iranian Foundation's immunity; if plaintiff is proved correct, discovery will have enabled him to seek relief for a serious wrong.

Gabay v. Mostazafan Foundation of Iran, 151 F.R.D. 250, 257 (S.D.N.Y. 1993), *reproduced in* Pet. App. at 27A.

activities of the New York Foundation, its alleged agent. (151 F.R.D. at 257, Pet. App. at 25A).

2. For over two years following Judge Wood's ruling, the Iranian Foundation and the New York Foundation responded to Gabay's voluminous discovery requests. Gabay served on both foundations extensive interrogatories, requests for admissions and demands for the production of a large volume of documents. In addition, with respect to the New York Foundation, Gabay took the depositions of its present and past directors, some present and former employees, and of former Secretary of State William Rogers who had served on the board of the New York Foundation. With regard to the Iranian Foundation, Gabay initially demanded that six of its past and present chief executives be produced for depositions in New York. Because of the United States government's restrictions on travel by Iranian officials to this country, the Iranian Foundation produced in Europe Mr. Abass Khadjeh-Piri, the Iranian Foundation's vice-president and general counsel, as its Rule 30(b)(6) witness. Mr. Khadjeh-Piri was also examined at length by Gabay's counsel on matters that he had addressed in a declaration submitted in support of the Iranian Foundation's original motion to dismiss.

The evidence produced by the two foundations during the discovery established incontrovertibly that there existed no "alter ego" relationship between the Iranian Foundation and the New York Foundation. The latter is a not-for-profit corporation existing under the laws of the State of New York. It has no owner, and its property is used exclusively for charitable purposes in accordance with its certificate of incorporation and by-laws, and subject to the supervision by the authorities of the State of New York. In the event of its dissolution, its net assets would escheat to the State. Its directors are elected by its board and they act independently

of any other entity. It provides its own financing. It hires its own employees. It maintains its own bank accounts. It prepares its own tax returns and maintains its own books and financial records. Not a scintilla of evidence was produced by Gabay to show that the Iranian Foundation had any relationship with, or control over, the New York Foundation.

A further fatal flaw in Gabay's jurisdictional hypothesis emerged only during discovery: not only was Gabay's assertion that the Iranian Foundation itself seized Gabay's property untrue, but unimpeached testimony and unchallenged documentary evidence established that the Iranian Foundation did not *own or operate* the property taken from Gabay.

In 1995, while the jurisdictional discovery was still in progress, the case was reassigned to the Honorable Sidney H. Stein. Following completion of the discovery, both foundations renewed their original dispositive motions.

3. On June 4, 1997, Judge Stein ruled that he lacked subject matter jurisdiction over the Iranian Foundation under the FSIA's expropriation exception to sovereign immunity. (Pet. App. 4A-13a).

In his opinion and order, Judge Stein summarized Judge Wood's earlier thorough analysis of the FSIA and the circumstances under which a foreign governmental agency's separate juristic personality could be disregarded. (Pet. App.9A-11A). He adhered to Judge Wood's ruling that to establish an alter ego relationship between two separate and independent agencies of a foreign state, a claimant must show that the dominant agency exercised control over the day-to-day activities of the alleged alter ego or agent (*id.* at 10A). He concurred in Judge Wood's holding that under this Court's applicable law a plaintiff "has the burden of overcoming the presumption of independence on the part of defendant

foundations," citing *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, ("*Bancec*") 462 U.S.611 (1983). (*Ibid.*).

Judge Stein rejected Gabay's renewed attempt to distinguish this Court's holding in *Bancec*. Gabay argued — as he does again in his petition here — that the presumption of separateness should be applied only to relationships between a foreign state and one of its separate agencies or instrumentalities, but not to the relationship between two separate state agencies. After analyzing the *Bancec* holding, Judge Stein concluded that "[n]o cause has been shown to abandon Judge Wood's determination that the pivotal issue is whether the Iranian Foundation exercised control over the day-to-day activities of the New York Foundation." (*Ibid.*)

Turning to the evidence adduced during discovery (Pet. App. 11A), Judge Stein concluded that "Gabay has put forward insufficient evidence of day-to-day control [by the Iranian Foundation over the New York Foundation] to establish subject matter jurisdiction within the purview of the FSIA." (*Id.* at 13A). He, therefore, granted the Iranian Foundation's motion to dismiss for want of jurisdiction under the FSIA, and the New York Foundation's motion for summary judgment for failure to state a justiciable claim.(*Ibid.*). Judge Stein did not address the additional evidence produced by the Iranian Foundation establishing that it did not own or operate the property that was seized, as Gabay's complaint asserted. To maintain an action against the Iranian Foundation under the second sentence of §1605(a)(3), Gabay had the burden of establishing that fact.

The Second Circuit summarily affirmed the district court's dismissal of the suit on the ground that "Gabay has offered insufficient evidence to overcome the presumption of independence between defendants Mostazafan Foundation of

Iran and Mostazafan Foundation of New York." (Pet. App. 2A). That court, too, did not enter into a discussion of the Iranian Foundation's lack of ownership or operation of the seized properties.

REASONS FOR DENYING THE WRIT

1. The decision below was a plainly correct application of settled agency and alter ego law. Gabay's fact bound claim that the courts below erred in not attributing the New York Foundation's charitable activities in New York to the Iranian Foundation in Tehran is devoid of substance.

Despite his herculean efforts during discovery, Gabay failed to produce any probative evidence that would tend to show the New York Foundation was or is controlled or directed by the Iranian Foundation or in any other way subservient to the latter. In consequence, the district court was right in dismissing the action against the Iranian Foundation for lack of subject matter jurisdiction under §1605(a)(3) of the FSIA, and the Second Circuit was correct in summarily affirming the disposition below. Plainly, the Iranian Foundation does not engage directly or through an agent or alter ego in any commercial activity in the United States which alone would permit the maintenance of this suit under the FSIA's expropriation exception.

2. In the leading case of *Bancec*, this Court applied general principles of corporate law to the question of whether a foreign corporation and a foreign government were alter egos. The Court emphasized that as a general matter the legal separateness of corporations owned or created by foreign governments must be respected:

> A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the

> instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply. . .
>
> Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee. As a result, the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated. Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude . . . that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.

Id. At 624, 626-27 (citations and footnotes omitted). The *Bancec* Court was, however, at pains to make clear that in certain narrowly circumscribed situations it is appropriate to disregard the separate legal status of the corporation and

permit recovery from the government for the liabilities of the corporation. The Court offered several examples of situations in which the legal separateness conferred by the corporate form may be disregarded:

> Where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of another. In addition, our cases have long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice."

In the years since the *Bancec* decision, lower courts have found an alter-ego relationship in the foreign sovereign context in two situations. The first situation arises where the government has "assumed day-to-day operation of the instrumentality which it owns." *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 178 (5th Cir. 1989); *see also Walter Fuller Aircraft Sales v. Republic of the Philippines*, 965 F.2d 1375, 1382 (5th Cir. 1992); *Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F.Supp. 289, 294 (S.D.N.Y. 1987); *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 616 F.Supp. 660,666 (W.D. Mich. 1985). The second situation arises where "there has been an abuse of the corporate form." *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 564 (11th Cir. 1987); *see also Letelier v. Republic of Chile*, 748 F.2d 790, 794 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125, 86 L. Ed. 2d 273, 105 S. Ct. 2656 (1985); *Baglab*, *supra*.

In the absence of probative evidence compelling the conclusion that one of these situations has arisen, the courts below were plainly correct in rejecting Gabay's hypothesis

that the New York Foundation was an agent or alter ego of the Iranian Foundation and that, in consequence, the Iranian Foundation engaged in business in this country through its agent.

3. Gabay contends that the teachings of *Bancec* as to when the activities of an agency of a foreign state can be attributed to the foreign state itself should be discarded when dealing with two agencies or instrumentalities of a foreign state. (Pet. at 20-22). His proposed distinction is without authoritative support and does not withstand scrutiny. Regardless of whether certain acts of an independent agency are to be attributed to a foreign state or to another separate agency, there must be some showing that such acts were in fact performed by the putative agent on behalf of its alleged principal, or pursuant to the direction or control of the principal. The record below is barren of any such showing.

4. Gabay's concern that the "day-to-day control" test used by the courts below will create a "safe harbor for outlaws" is devoid of substance. He claims that "there is evidence that entities like the Mostazafan Foundation of Iran are covertly taking advantage of the American legal system through agents over which they exercise general control and supervision." (Pet. at 22).

The contention is nothing but consummate hyperbole, since Gabay has produced not a speck of evidence that the Iranian Foundation is "covertly taking advantage" of American law. Its sole contact with the American legal system has been its overt appearance in this action.

CONCLUSION

The concurrent findings by the courts below are fully supported by the record evidence and are correct as a matter of law. This petition does not present a case that warrants review under any of the guidelines set forth in Rule 10 of this Court's Rules. Accordingly, the petition should be denied.

Dated: October 30, 1998

Respectfully submitted,

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